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8 ATTORNEYS FOR PLAINTIFFS
WINDSOR AUCTIONS, INC. AND
9 JEWELRY AUCTIONS, INC.

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12
13 WINDSOR AUCTIONS, INC., a Florida
corporation, and JEWELRY AUCTIONS,
14 INC., a Florida corporation,

15 Plaintiffs,

16 v.

17 EBAY INC., a Delaware corporation,

18 Defendant.

CASE NO. C07 06454 RMW (PVT)

PLAINTIFFS' MEMORANDUM OF POINTS
AND AUTHORITIES IN OPPOSITION TO
DEFENDANT'S MOTION TO DIMISS

Date: April 11, 2008
Time: 9:00 AM
Judge: Hon. Ronald M. Whyte

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CASE No. C07 064 54 RMW (PVT)

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PLAINTIFFS' MPA IN OPPOSITION TO DEFENDANT'S MOTION TO DIMISS

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1 Plaintiffs Windsor Auctions, Inc. and Jewelry Auctions, Inc. hereby oppose the motion
 2 by Defendant eBay Inc. to dismiss every cause of action in the Complaint pursuant to Federal
 3 Rule of Civil Procedure 12(b)(6).

4 I. INTRODUCTION

5 The essential allegation underpinning eBay's arguments is that Plaintiffs never were
 6 eBay's clients. This is plainly wrong. The fact of the business relationship between Plaintiffs
 7 and eBay is illustrated by reference to the Complaint. The nature of the relationship between
 8 eBay and Plaintiffs is demonstrated by the written agreement eBay filed under seal with the
 9 Court. eBay agreed to conduct business with Plaintiffs, and to offer Plaintiffs both services and
 10 technology, including software, in connection with Plaintiffs' use of eBay's Live Auctions
 11 platform. The fact of the direct contractual relationship, demonstrated by the agreement
 12 submitted by eBay itself, eviscerates eBay's central thesis that it did not conduct business with
 13 Plaintiffs.

14 As explained herein, each of eBay's protests to the four causes of action in the complaint
 15 is unavailing, and the motion should be denied.

16 II. STATEMENT OF FACTS¹

17 Plaintiffs are in the business of selling jewelry. Complaint ¶ 10. eBay owns and operates
 18 the largest online marketplace in the world at its website located at www.ebay.com. Complaint ¶
 19 7. eBay facilitates direct sales transactions between users, and also facilitates live auctions
 20 through its website located at www.ebayliveauctions.com ("eBay Live Auctions"). Complaint ¶
 21 7. In 2002, Live Auctioneers LLC ("Live Auctioneers") established a partnership with eBay to
 22 help bring auction catalogs to the Internet for live online bidding. Complaint ¶ 8. Live
 23 Auctioneers offers technology and services connecting auction houses and bidders through eBay

24
 25
 26 ¹ eBay's Motion to Dismiss contains numerous references to "facts" outside the Complaint. See,
 27 e.g., eBay's representations regarding the availability of the Batch Uploading Tool (p. 3 fn. 2 and
 28 p. 5 fn 4), as well as the reference to pre-litigation correspondence (p. 13 fn 14). Except under
 circumstances not present here, the Court should not consider facts outside the Complaint in
 ruling on eBay's Motion to Dismiss. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977,
 980 (9th Cir. 2002).

1 Live Auctions and a technological platform through which remote auction transactions can be
2 made on eBay's website. Complaint ¶ 8.

3 In 2005, Windsor Auctions entered into written agreements with both Live Auctioneers
4 and eBay², pursuant to which Windsor Auctions would sell jewelry domestically and
5 internationally through eBay Live Auctions. Complaint ¶ 10. eBay agreed to provide Windsor
6 Auctions with "the services and technology" necessary to enable Windsor Auctions to conduct
7 live jewelry auctions on eBay Live Auctions, including "the tools associated with eBay such as
8 Mr. Lister."³ eBay-Windsor Agreement, Sections 4(a) and 1(j). Plaintiffs commenced selling
9 jewelry through Live Auctioneers and eBay Live Auctions. Complaint ¶ 10.

10 From mid-2005 through 2006, revenue from sales for Windsor Auctions through eBay's
11 Live Auctions exceeded \$1.4 million. Complaint ¶ 10. Commencing in mid-2007, Plaintiffs
12 realized that instead of enjoying increased sales to a projected \$2.8 million for 2007, Plaintiffs'
13 sales and revenues were decreasing markedly. Complaint ¶ 11. While Plaintiffs' sales and
14 revenue were decreasing, those of a competitor, George Molayem, increased dramatically.
15 Complaint ¶ 12. Mr. Molayem runs a variety of businesses which conduct live jewelry auctions
16 through eBay Live Auctions. Complaint ¶ 12. Mr. Molayem does not use the intermediary
17 services of Live Auctioneers; rather, he is a direct client of eBay. Complaint ¶ 12. eBay earns a
18 lesser commission on live auction sales conducted with the assistance of Live Auctioneers than it
19 does on live auctions conducted directly through eBay. Complaint ¶ 9.

20 Plaintiffs discovered that Mr. Molayem had access to an auction time-duration tool (the
21 "Batch Uploading Tool") that, when manipulated, allowed him to upload auction items in
22 batches, placing his sales items at the front of eBay's "core listings," which appear first in sales
23

24 ² The referenced agreement between eBay and Windsor Auctions will hereafter be called the
25 "eBay-Windsor Agreement," which eBay has submitted to the Court under seal.

26 ³ "Mr. Lister" is a software product described more fully at Section III.B(2) below. While eBay
27 submitted the eBay-Windsor Agreement under seal, eBay also put the terms of the agreement at
28 issue in its moving papers, which were not submitted under seal and so are publicly available. It
did so by offering its own interpretation of those terms. Thus, eBay has waived any argument
that the publicly-discussed terms of the eBay-Windsor Agreement are confidential, and Plaintiffs
have selectively quoted provisions necessary to counter effectively eBay's arguments.

1 listings on the website. Complaint ¶ 13. Mr. Molayem's manipulation of the Batch Uploading
 2 Tool allowed his items to be consistently placed at the front of the "core listings," regardless of
 3 the ending time for his auctions. Complaint ¶ 13. The Batch Uploading Tool was not available
 4 to Plaintiffs, so Plaintiffs' items were listed at or near the end of the total listings until just a few
 5 hours before the ending time. Complaint ¶ 14. Accordingly, Plaintiffs' listings were so buried
 6 as to be virtually invisible through much of the duration of an auction, and that lack of visibility
 7 has had a dramatically negative effect on Plaintiffs' sales. Complaint ¶ 14.

8 eBay is aware of Mr. Molayem's manipulation of the Batch Uploading Tool, initially
 9 secretly allowed Mr. Molayem to use the Batch Uploading Tool, and now openly condones such
 10 use. Complaint ¶ 15. This reckless approach by eBay has resulted in a competitive advantage
 11 for Mr. Molayem and his eBay Live Auctions businesses, and a concomitant competitive
 12 disadvantage for all other sellers not provided access to the Batch Uploading Tool, including
 13 Plaintiffs. Complaint ¶ 15. Mr. Molayem's items enjoyed preferential listing status, making
 14 Plaintiffs' items difficult to find and therefore less likely to attract buyers. Complaint ¶ 20.

15 Plaintiffs use eBay's live auctions services on like terms and conditions as Mr. Molayem.
 16 eBay extended to Mr. Molayem a special privilege, the use of the Batch Uploading Tool, which
 17 was not extended to Plaintiffs. Complaint ¶ 22. eBay's extension to Mr. Molayem of this
 18 special privilege has injured Plaintiffs in that their sales and revenues have declined substantially
 19 as a result. Complaint ¶ 23. eBay's secret acquiescence in Mr. Molayem's use of the Batch
 20 Uploading Tool, a special privilege not extended to Plaintiffs, tends to destroy competition in
 21 that Plaintiffs and Mr. Molayem, both competitors in the same marketplace, are not competing
 22 on an even basis. Complaint ¶ 24.

23 III. ARGUMENT

24 A. eBay Has Failed to Meet the Legal Standard Necessary for the Court to Grant 25 its Motion to Dismiss

26 Federal Rule of Civil Procedure 8(a) requires complaints to contain "a short and
 27 plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. Pro.
 28 ("F.R.C.P.") 8(a). "[A]ntitrust pleadings need not contain greater factual specificity" than other

1 complaints. *Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan*, 662 F.2d 641, 648
2 (9th Cir. 1981).

3 A Rule 12(b)(6) motion tests the legal sufficiency of a claim. A claim may be dismissed
4 only if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim
5 which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Cahill v.*
6 *Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996). In deciding such a motion, all material
7 allegations of the complaint are accepted as true, as well as all reasonable inferences to be drawn
8 from them. *Cahill*, 80 F.3d at 338. Dismissal is proper only where there is no cognizable legal
9 theory or an absence of sufficient facts alleged to support a cognizable legal theory. *Balistreri v.*
10 *Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988).

11 Because Rule 12(b)(6) focuses on the “sufficiency” of a claim – and not the claim’s
12 substantive merits – “a court may [typically] look only at the face of the complaint to decide a
13 motion to dismiss.” *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir.
14 2002). When the complaint is accompanied by attached documents, such documents are deemed
15 part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion.
16 *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987).⁴

17 B. Plaintiffs Allege Facts Sufficient to Maintain a Robinson-Patman Act Claim
18 Against eBay

19 eBay argues that Plaintiffs’ Robinson-Patman Act claim fails because (1)
20 Plaintiffs have not alleged “two or more contemporaneous sales by the same seller;” (2)
21 Plaintiffs have not alleged price discrimination in the sale of commodities; and (3) eBay is
22 entitled to assert the “availability exception” affirmative defense. Each argument fails. eBay’s
23 agreement to provide services and technology constitutes a commodity sufficient to state a claim
24 under the Robinson-Patman Act. Plaintiffs have alleged two such sales of services and

25 _____
26 ⁴ Plaintiffs did not attach the Windsor/eBay agreement to the Complaint because the agreement
27 contains a confidentiality provision (*see* Complaint ¶ 35), and because incorporation of the entire
28 agreement is not necessary to support Plaintiffs’ claims. However, Plaintiffs referenced the
agreement in the Complaint, eBay has now filed the agreement with the Court under seal, and
Plaintiffs have no objection to the Court’s consideration of the agreement in connection with
eBay’s motion to dismiss, as eBay requests.

1 technology by eBay: one to Plaintiffs, and one to George Molayem. Finally, the availability of
 2 an affirmative defense is not a basis on which to grant a motion to dismiss – eBay may assert the
 3 defense in its answer, and will be tasked with proving that defense.

4 1. Plaintiffs Have Alleged Two or More Contemporaneous Sales by the
 5 Same Seller

6 eBay's focus on its provision of the Batch Uploading Tool is misplaced in
 7 this analysis. It is not the sale of the tool that supports Plaintiffs' Robinson-Patman claim; it is
 8 the sale of access to the eBay Live Auctions platform, and the technology to enable Windsor
 9 Auctions and George Molayem to conduct their jewelry auctions. eBay sold these services and
 10 technology to both Windsor Auctions and Mr. Molayem (through his various business entities).
 11 eBay's conduct in offering the Batch Uploading Tool to Mr. Molayem but not to Plaintiffs is the
 12 wrongful conduct at issue, but the seller is eBay and the sale was for access and technology
 13 relating to eBay Live Auctions.

14 eBay argues that Live Auctioneers is a "third-party intermediary completely independent
 15 from eBay." While this is demonstrably not true,⁵ it is at best a disputed fact that eBay is entitled
 16 to deny in its answer. eBay's objection to Plaintiffs' characterization of the eBay/Live
 17 Auctioneers relationship as a "partnership" is not a basis on which to dismiss any of Plaintiffs'
 18 claims.

19 2. Plaintiffs Have Alleged Price Discrimination in the Sale of Commodities

20 Windsor Auctions entered into a written agreement with eBay, pursuant to
 21 which Windsor Auctions would sell jewelry via eBay's Live Auctions platform. Complaint ¶ 31.
 22 eBay agreed to provide Windsor Auctions with "the services and technology" necessary to
 23 enable Windsor Auctions to conduct live jewelry auctions on eBay Live Auctions, meaning "the

24 ⁵ A widely available press release from 2004 heralds the "significant marketing partnership
 25 agreement" between Live Auctioneers and eBay Live Auctions, and states that the two entities
 26 will work in "close association [...] providing clients with encoded online catalogs and access to
 27 a full suite of marketing and tracking tools." Declaration of Gregory Skibbee ("Skibbee Decl."),
 28 ¶ 2. Plaintiffs' allegations that the two entities have a partnership are sufficient for purposes of
 denying eBay's motion to dismiss, but given eBay's statement that Live Auctioneers is
 "completely independent from eBay," Plaintiffs bring this extrinsic evidence to the Court's
 attention.

1 tools associated with eBay such as Mr. Lister.” eBay-Windsor Agreement, Sections 4(a) and
 2 1(j). The referenced tool, Mr. Lister, is a software product now called Turbo Lister that eBay
 3 customers must use for inventory control and bulk uploading of their auction catalogs, and is
 4 required for use of eBay Live Auctions. Skibbee Decl., ¶¶ 3,4. As is clear from the language of
 5 the eBay-Windsor Agreement, eBay also provides other software and associated tools in
 6 connection with the use of eBay Live Auctions.

7 The Ninth Circuit has held that under Robinson-Patman, a sale of commodities is a “sale
 8 of goods, wares, or merchandise and is not merely a contract for services.” *May Dep’t Store v.*
 9 *Graphic Process Co.*, 637 F.2d 1211, 1214 (9th Cir. 1980) (*quoting Rangen, Inc. v. Sterling*
 10 *Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965)). In *May*, the Ninth Circuit found that there
 11 were “no congressional discussions on the distinction between goods and services,” and that
 12 “[l]egislative history reveals only that Congress intended the Act to apply to tangible goods and
 13 not services.” *Id.* (*quoting* 79 Cong. Rec. 9079, June 11, 1935).

14 Here, the transaction involves both goods and services. For this situation, the *May* court
 15 adopted the “dominant nature” test to determine how to characterize the transaction for the
 16 purposes of the Robinson-Patman Act. 637 F.2d at 1215. Under this test, a court looks to
 17 whether a transaction is primarily for tangible products or for services. *Id.*

18 This Court has previously applied the dominant nature test in similar factual
 19 circumstances, in connection with a motion for summary judgment. *Ansel Communications, Inc.*
 20 *v. Novell, Inc.*, 1999 U.S. Dist. LEXIS 22738 (N.D. Cal. 1999). In *Ansel*, the issue was whether
 21 a software developer’s agreements with distributors and resellers involved the sale of
 22 “commodities” within the Robinson-Patman Act. The software developer argued that it licensed
 23 the right to use its software, that the license conveyed no ownership rights in the software, and
 24 that such transactions should be considered licenses and not sales of commodities. *Ansel* at *7.
 25 It argued further that any use of tangible materials in connection with the software, such as
 26 manuals, disks, or packaging, was incidental because the software could be downloaded via the
 27 Internet. *Id.* The plaintiff argued that the software developer treated the distribution of its
 28 software as sales of tangible goods. *Id.* at *8. This Court ruled that neither party had carried its

1 burden on summary judgment and that the case presented a factual question not suitable for
2 summary adjudication. *Id.* at *8-9.

3 Similarly, the determination here as to whether the dominant nature of the transactions
4 between the parties is for services or commodities is a factual determination and is not
5 appropriately made in connection with this motion to dismiss. At a minimum, Plaintiffs'
6 Complaint coupled with the eBay-Windsor Agreement demonstrates that the express contractual
7 relationship contemplates provision of both services and "technology," including software, and
8 this is sufficient to allege the sale of a commodity under Robinson-Patman.

9 3. The Availability of an Affirmative Defense Is not a Basis on Which to
10 Grant a Motion to Dismiss

11 eBay's final attack on the Robinson-Patman claim is that Plaintiffs have
12 not made allegations sufficient to overcome an affirmative defense eBay believes to be available
13 to it. This argument fails as well, because a plaintiff is not required to plead around every
14 potential affirmative defense in order to state a claim under the Federal Rules. Rather, the
15 complaint must contain "a short and plain statement of the claim showing that the pleader is
16 entitled to relief," and "antitrust pleadings need not contain greater factual specificity" than other
17 complaints. F.R.C.P. 8(a); *Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan, supra*,
18 662 F.2d at 648. The claim may be dismissed only if it appears beyond doubt that Plaintiffs can
19 prove no set of facts in support of their claim that would entitle them to relief. *Conley v. Gibson*,
20 *supra*, 355 U.S. at 45-46.

21 Therefore, Plaintiffs are not required to plead every set of facts that would entitle them to
22 relief, including a set of facts designed to overcome the "availability exception" affirmative
23 defense. Instead, Plaintiffs are required to plead at least one set of facts that would entitle them
24 to relief, as they have done.

25 C. Plaintiffs Allege Facts Sufficient to Maintain a California Unfair Practices Act
26 Claim Against eBay

27 eBay's central argument regarding the Second Cause of Action under the
28 California Unfair Practices Act (California Business and Professions Code §§ 17405, *et seq.*), is
based on its faulty premise that because Plaintiffs used Live Auctioneers' services in connection

1 with offering its jewelry auctions on eBay Live Auctions, Plaintiffs were not clients of eBay.
 2 eBay argues this means that Plaintiffs and Mr. Molayem were not purchasing on “like terms and
 3 conditions,” as is required to support a claim under the Unfair Practices Act for the extension of
 4 special privileges to certain purchasers. To the contrary, the facts alleged by Plaintiffs present a
 5 textbook case of the extension of special privileges.

6 Plaintiffs are eBay’s clients and use eBay’s live auctions services, as demonstrated by
 7 both the allegations of the Complaint and the eBay-Windsor Agreement. Plaintiffs have alleged
 8 that they use eBay’s live auction services on like terms and conditions as Mr. Molayem, and that
 9 eBay extended to Mr. Molayem a special privilege, the use of the Batch Uploading Tool, which
 10 was not extended to Plaintiffs. Complaint ¶ 22.

11 It is true that Plaintiffs purchased some services and technology from Live Auctioneers –
 12 this fact is at the heart of eBay’s motivation to provide Mr. Molayem special privileges, as eBay
 13 garners higher listing fees from its business with Mr. Molayem than from its business with
 14 Plaintiffs. Complaint ¶ 9. Plaintiffs’ interaction with Live Auctioneers does not negate the fact
 15 that Plaintiffs also purchased services and technology from eBay.

16 Finally, eBay again asserts that the alleged availability of an affirmative defense entitles
 17 it to have Plaintiffs’ claim dismissed now. eBay argues that it is entitled to offer different
 18 services to Mr. Molayem and Plaintiffs, and so will be successful in asserting the “functional
 19 classification” defense. This is not a jurisdictional defense, and it depends upon a factual
 20 showing. As stated earlier, the potential availability of an affirmative defense is not a basis on
 21 which to grant a motion to dismiss. To rule otherwise would fundamentally alter the litigation
 22 process to eliminate discovery and the opportunity, as well as the obligation, of litigants to prove
 23 their claims and defenses.

24 D. Plaintiffs Allege Facts Sufficient to Maintain a Common Law Unfair
 25 Competition Claim Against eBay

26 Plaintiffs’ claim for common law unfair competition incorporates all of the factual
 27 allegations set forth in the Complaint. Plaintiffs allege that eBay engaged in an activity that was
 28 known to affect an economic relationship of Plaintiff (Complaint, ¶ 26 – eBay provided the

1 Batch Uploading Tool to Mr. Molayem but not to Plaintiffs), that there was a foreseeable risk of
 2 harm to Plaintiffs' economic relationship if eBay failed to use ordinary care (Complaint, ¶ 7 –
 3 eBay operates the largest online marketplace in the world and facilitates direct sales transactions
 4 and live auctions), that there was a close connection between eBay's negligence and Plaintiffs'
 5 injuries (Complaint, ¶¶ 18, 20 – eBay's encouraging and endorsing Mr. Molayem's use of the
 6 Batch Uploading Tool resulted in his items' enjoying preferential listing status, making
 7 Plaintiffs' items difficult to find and therefore less likely to attract buyers, and Plaintiffs' sales
 8 plummeted), that Plaintiffs' injury resulted in certain damages (Complaint, ¶¶ 20, 29), and that
 9 eBay's conduct was wrongful or blameworthy (Complaint, ¶¶ 16-25) – eBay's provision of the
 10 Batch Uploading Tool as a secret privilege violates both the Robinson-Patman Act and the
 11 California Unfair Practices Act).

12 This is sufficient to state a cause of action for negligent interference with economic
 13 relations, which is a form of unfair competition under California law. A cause of action for
 14 negligent interference with economic relations is elementally similar to negligence actions in
 15 general, and in particular to actions to recover for economic losses resulting from negligence in
 16 performing a contract to which the plaintiff was a third party beneficiary. *J'Aire Corp. v.*
 17 *Gregory* (1979) 24 Cal. 3d 799, 804-08. Here, Plaintiffs have alleged duty, breach, causation,
 18 and injury. *See United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal. 3d 586, 594
 19 (general elements of actionable negligence). There is a question whether an allegation of
 20 wrongful conduct beyond the interference itself is required (*compare National Med. Transp.*
 21 *Network v. Deloitte & Touche* (1998) 62 Cal. App. 4th 412, 440 *with Lange v. TIG Ins. Co.*
 22 (1998) 68 Cal. App. 4th 1179, 1187-89). Nevertheless, Plaintiffs have alleged the conduct is
 23 wrongful by virtue of the allegations that it violates the Robinson-Patman Act and the California
 24 Unfair Practices Act.

25 Plaintiffs' Third Cause of Action for common law unfair competition states a claim
 26 against eBay and the motion should be denied.

1 E. Plaintiffs Allege Facts Sufficient to Maintain a Breach of the Implied
 2 Covenant of Good Faith and Fair Dealing Claim Against eBay

3 To maintain a claim for breach of the implied covenant of good faith and fair dealing, it is
 4 not necessary to allege that the eBay-Windsor Agreement “required eBay to provide an ‘auction
 5 time-duration tool’ or to disclose competitors’ use of such a tool,” contrary to eBay’s argument.
 6 See eBay’s Memorandum of Points and Authorities, pp. 13:18 – 14:3. Rather, those specific
 7 allegations would support a claim for breach of contract for eBay’s provision of the Batch
 8 Uploading Tool to Mr. Molayem but not to Plaintiffs. Breach of contract and breach of the
 9 implied covenant of good faith and fair dealing protect different interests in the performance of
 10 the contract. In fact, one cannot maintain a claim for breach of the covenant if it does not go
 11 beyond a statement of mere contract breach. *Careau & Co. v. Security Pacific Business Credit,*
 12 *Inc.*, 222 Cal. App. 3d 1371, 1395 (1990).

13 Rather than allegations supporting a claim for breach of the express terms of the contract,
 14 what is necessary here are allegations that eBay acted in a way that injured the right of Plaintiffs
 15 to receive the benefits of the agreement. *Progressive West Ins. Co. v. Superior Court*, 135 Cal.
 16 App. 4th 263, 277 (2005). The implied covenant imposes upon each party the obligation to do
 17 everything that the contract presupposes they will do to accomplish its purpose, and bad faith
 18 implies unfair dealing rather than mistaken judgment. *Id.*

19 Plaintiffs have alleged that eBay and Windsor Auctions entered into the eBay-Windsor
 20 Agreement, and they have alleged the general terms of that agreement – for eBay to provide a
 21 Live Auction platform for sales of jewelry. Complaint, ¶ 31. eBay has introduced to the Court
 22 the eBay-Windsor Agreement detailing eBay’s agreement to provide the tools necessary for
 23 Windsor Auctions to use eBay’s Live Auction platform. eBay-Windsor Agreement, Sections
 24 4(a) and 1(j). Plaintiffs have alleged that eBay provided the Batch Uploading Tool to their
 25 competitor, Mr. Molayem, but not to them, and that eBay’s actions were unfair, secretive, and
 26 injured Plaintiffs. Complaint, ¶ 13-15, 22, 33. Plaintiffs have alleged that eBay acquiesced in
 27 Mr. Molayem’s use of the Batch Uploading Tool because Mr. Molayem’s completed sales
 28 generate more revenue for eBay than do sales by Plaintiffs. Complaint, ¶ 25. Finally, Plaintiffs

1 have alleged that Windsor Auctions reasonably expected that entering into the eBay-Windsor
 2 Agreement would put Windsor on equal footing with all other sellers using eBay Live Auctions,
 3 and that eBay's actions disappointed those reasonable expectations. Complaint, ¶ 34.

4 These allegations are sufficient to state that eBay acted in a way that injured the right of
 5 Windsor Auctions to receive the benefits of the eBay-Windsor Agreement, and the motion to
 6 dismiss the Fourth Cause of Action should be denied.

7 F. If the Court Determines that Any of Plaintiffs' Claims Fail to State a Cause
 8 of Action Against eBay, Leave to Amend Should Be Granted

9 Dismissal without leave to amend is appropriate only when the Court is satisfied
 10 that the deficiencies of the complaint could not possibly be cured by amendment. *Jackson v.*
 11 *Carey*, 353 F.3d 750, 758 (9th Cir. 2003). Plaintiffs' Complaint satisfies the Federal Rules
 12 requirement for notice pleading and eBay's motion should be denied in its entirety. If the Court
 13 determines that more detail is required, the Court should grant leave to amend the Complaint.

14 IV. CONCLUSION

15 eBay contracted directly with Windsor Auctions, agreeing to provide it both products –
 16 such as “Mr. Lister” and other “technology and tools” – and services in connection with
 17 Windsor's use of eBay's Live Auctions platform. eBay also agreed to provide these products
 18 and services to Windsor's competitor in live auction jewelry sales, George Molayem. The
 19 software and technology that eBay contracted to provide are commodities, bringing these
 20 business dealings within the Robinson-Patman Act.

21 eBay's arguments challenging the sufficiency of each of the four causes of action in the
 22 complaint are unavailing, as demonstrated herein, and the motion should be denied in its entirety.

23 DATED: MARCH 21, 2008

RESPECTFULLY SUBMITTED,

24 BERLINER COHEN

25 BY: /s/
 26 RALPH J. SWANSON
 27 H. ANN LIROFF
 28 SHANNON N. COGAN
 ATTORNEYS FOR PLAINTIFFS
 WINDSOR AUCTIONS, INC. AND
 JEWELRY AUCTIONS, INC.